

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

MICHAEL J. DELESSIO,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
NY07528610522

DATE: MAY 6 1987

Michael J. Delessio, Albany, New York, pro se.

Samuel M. Pulcrano, Albany, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Dennis M. Devaney, Member

OPINION AND ORDER

The agency petitions for review of an initial decision issued on November 21, 1986, by a designated administrative judge of the Board's New York Regional Office, reversing the agency's action removing the appellant from his position of Mail Handler. For the reasons set forth in this Opinion and Order, the agency's petition for review is GRANTED, the initial decision is REVERSED, and the agency action is SUSTAINED.

BACKGROUND

The appellant was removed upon a charge of falsification of his employment application of March 20, 1985. The penalty was also based on three prior disciplinary actions taken against him within his approximately 15-month tenure with the agency.<sup>1</sup> Specifically, the agency charged that the appellant deliberately answered, "No," to Question No. 18 on the application form, "[h]ave you ever been convicted of an offense against the law....," even though he had in fact been convicted of five criminal offenses between 1976 and 1984. Upon appeal to the Board, the appellant explained that his answer was indeed in error but that it was merely a mistake resulting from his having merely "skimmed over" the questions when filling out his application.

Following a hearing on the matter, the administrative judge concluded in her initial decision that when filling out the same application for a 90-day, seasonal position with the agency on August 22, 1984, the appellant had similarly answered in the negative to Question No. 18, but had in fact revealed in his pre-appointment interview with the facility employment officer information that led the employment officer to enter on the application, "1976 unlawful use of motor vehicle/ Albany NY." She also

---

<sup>1</sup> These actions were two seven-day suspensions for leaving his work area without permission, and a letter of warning for a lesser infraction.

determined that whether or not the employment officer knew that this particular entry referred to a conviction for Driving While Intoxicated (DWI), the employment officer was aware of the existence of such a conviction in 1980<sup>2</sup> and, because of that offense, denied the appellant employment in a temporary position requiring driving.

She concluded therefore that, because the employment officer knew of a DWI conviction, it was "most unlikely that the appellant would deliberately give a false response to a question when he knew that the agency already had in its possession some of the information called for by that question." Initial Decision at 5. Citing *Dennis v. Department of Health and Human Services*, 804 F.2d 670 (Fed. Cir. 1986), and *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986), for the proposition that the submission of an incorrect response on a government document does not control the question of intent to deceive the agency, the administrative judge concluded that the agency in this case had not proven by preponderant evidence the appellant's intent to deceive it by answering Question No. 18 as he did. She therefore ordered the agency to cancel its removal action against the appellant.

---

<sup>2</sup> The only DWI conviction mentioned by the administrative judge in the initial decision or documented in the record is that of August 22, 1980. It is that offense to which we assume the administrative judge refers.

ANALYSIS

In a lengthy petition for review, the agency alleges that the administrative judge made an erroneous interpretation of law and regulation in reversing the removal. We agree.

As the administrative judge stated in her initial decision, while circumstantial evidence may be used to satisfy the agency's burden of proof, the inferences allowable from such evidence depend upon the strength of that evidence. See *Jefferson v. Defense Logistics Agency*, 22 M.S.P.R. 10, 13 (1984). Further, in cases such as this, in which proof of intent must be derived inferentially from circumstantial evidence, no per se evidentiary rules apply and all of the evidence must be considered. See *Naekel*, 782 F.2d at 979.

Our review of this case persuades us that the administrative judge erred in her assessment of the totality of the evidence. As noted above, the record reveals that in August of 1984, the appellant failed to disclose on his application for a temporary position with the agency the existence of his prior criminal convictions, although the agency employment officer otherwise learned of a 1980 DWI conviction, which resulted in his being deemed ineligible for a position requiring driving. We can infer that, from that experience, the appellant learned that revelation of his prior convictions would seriously jeopardize his chances

for employment with the agency. In any case, the wording of the application itself warned applicants that "[a] false or dishonest answer to any question in this Statement may be grounds for not employing you or for dismissing you after you begin work...." Clearly, then, the appellant was on notice of the potential consequences of untruthfulness in this regard.<sup>3</sup>

We also find unconvincing, under the circumstances, the administrative judge's conclusion that the appellant's omission of clearly requested information could have been a simple mistake made as a result of "skimming over" the questions. While the Board normally pays due deference to credibility determinations made by the administrative judge on the basis of a witness' demeanor, the question of the appellant's intent in this case must be resolved not from demeanor evidence alone, but rather from the totality of the circumstantial evidence.

Although it may be true, as the administrative judge found, that the appellant "testified in a straightforward manner" in this regard (ID at 5), the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only so much weight as may be warranted by the

---

<sup>3</sup> Cf. *Naekel*, 782 F.2d at 979, in which the Federal Circuit declined to infer intent to deceive where the form the employee filled out was "far from clear," and may have misled the employee into unintentionally providing erroneous information.

record and by the strength of the administrative judge's reasoning. See *Jackson v. Veterans Administration*, 768 F.2d 1325, 1330 (Fed. Cir. 1985) (Board is not bound by an administrative judge's credibility findings). Accord: *Universal Camera v. National Labor Relations Board*, 340 U.S. 474, 492-97 (1951) (the National Labor Relations Board is not required to adopt the credibility findings of its administrative law judges).

In this regard, we must agree with the agency's argument that it seems unlikely at best that the appellant--having once lost the opportunity for a temporary position with driving duties because of a driving conviction that he failed to disclose on an employment application--would, when completing the same application seven months later, simply forget the existence of five other more recent criminal convictions, three of which resulted in jail sentences, or fail to notice the question requesting that information.

We also find misplaced the administrative judge's reliance on the employment officer's admitted knowledge of the appellant's DWI conviction. As noted above, the administrative judge found it unlikely that the appellant would intentionally conceal the existence of four criminal convictions when he knew that the agency was aware of at least one other such conviction.

Even assuming, as is implied in the initial decision, that the employment officer remembered the appellant's DWI conviction when he reviewed the appellant's subsequent

application for employment in March of 1985, the fact remains that the appellant once again falsely answered Question No. 18, failing to mention not only the four other criminal convictions, but also the very DWI conviction upon which he knew the agency had based his rejection seven months previously. Having once suffered the consequences of a disclosed criminal conviction, the appellant clearly had motive not to disclose others. By the same token, the criminal convictions at issue were sufficiently serious and recent that the appellant could not reasonably have overlooked them when completing the application of March 20, 1985. Moreover, the appellant's "straightforward testimony" about his dishonest omissions does not make their omission any less dishonest.

In light of the foregoing, we find that the agency has proven, by preponderant circumstantial evidence, its charge against the appellant of intentional falsification of his March 20, 1985, employment application. Further, it is well settled that a nexus between intentional falsification of an employment application and the efficiency of the service may be presumed. *Kissner v. Office of Personnel Management*, 792 F.2d 133 (Fed. Cir. 1986). See also *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978).

Finally, we find that removal is a reasonable penalty for employment application falsification.<sup>4</sup> See *Pichot v. Department of Justice*, 29 M.S.P.R. 477 (1985), and *Shelton v. Office of Personnel Management*, 28 M.S.P.R. 389 (1985). This also has been held to be the case in the private sector, especially where, as in this case, there is an explicit proscription of such falsification. See *National Labor Relations Board v. Florida Steel Corporation*, 586 F.2d 436, 450 (5th Cir. 1978). See also *Firestone Tire & Rubber Co. v. National Labor Relations Board*, 539 F.2d 1335, 1336 n. 4 (4th Cir. 1976).

We therefore reverse the administrative judge's initial decision and sustain the agency's removal action.

#### ORDER

This is the Board's final order in this appeal. 51 Fed. Reg. 25,158 (1986) (to be codified at 5 C.F.R. § 1201.113(c)).<sup>5</sup>

---

<sup>4</sup> The appellant contends in his response to the petition for review that the agency should not be allowed to refer to the three prior disciplinary actions to which it cites in the notice of proposed removal. We need not address that contention here; removal is a reasonable penalty for the sustained falsification charge with or without reference to prior discipline.


<sup>5</sup> On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board